

MEMORANDUM

State of Alaska
Department of Law

To: The Honorable Loren Leman
Lieutenant Governor

Date: May 31, 2005

RECEIVED

File No.: 663-05-0210

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From:

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DIVISION OF ELECTIONS

Re: Review of Initiative Application
on Establishment of Gaming
Commission (05AGAM)

I. INTRODUCTION AND SUMMARY:

You have asked us to review an application for an initiative petition entitled "An Act relating to establishing the Alaska Gaming Commission." We have completed our review, and find that the application complies with the constitutional and statutory provisions governing the use of the initiative. Under these circumstances we recommend that you certify the application.

II. SUMMARY OF THE PROPOSED BILL AND ANALYSIS:

A. SUMMARY

As the bill proposed by the initiative relates to a specialized and complex area of the law, we have obtained the following explanation of the proposed bill from staff in the commercial section of our office who work with gaming issues:

The initiative entitled "An Act relating to Establishing the Alaska Gaming Commission" is similar to HB 509 from the Twenty-third Alaska Legislature. Certain parts of it, however, are strikingly different.

The preamble of the bill sets forth certain findings regarding the gambling industry in Alaska, not all of which are self-evident. In particular the claim that well-managed gaming in Alaska under the auspices of a gaming commission will protect the permanent fund seems somewhat tenuous.

The initiative creates a new regulatory entity within the Department of Revenue called the Alaska Gaming Commission. This commission would take over all responsibilities currently handled by the Gaming Group within the Department of Revenue.

Section 4 of the initiative creates a new chapter in statute, AS 05.18, which sets forth the powers and responsibilities of the commission.

In proposed AS 05.18.010 the commission is comprised of seven members, all appointed by the governor and subject to confirmation by the legislature. Two of the members are non-voting ex-officio members, one of whom has a gaming permit or license, and the other of whom has a license or permit to sell or serve alcohol under AS 04.11. Of the remaining five voting members, there must be representation from each of the four judicial districts. One must be a CPA and one must have at least five years in law enforcement. No more than three of the members may be from the same political party. The voting members serve staggered terms of five years and the ex officio members serve non-staggered terms of five years. This section also sets forth various other qualifications for appointment and provisions for removal.

Proposed AS 05.18.020 requires quarterly meetings of the commission.

Proposed AS 05.18.030 sets forth the duties and powers of the commission. Included among these are the powers to enter into contracts, adopt regulations, administer gaming laws, investigate violations of gaming law and monitor the gaming industry. The commission is also required to report on various matters pertaining to gaming.

The most significant enumerated power, and a significant deviation from HB 509, is the power to "authorize . . . the gaming laws under AS 05.15." AS 05.18.030(3). Similarly, proposed AS 05.18.100(a) provides that the "commission may authorize future gaming activity." The initiative also proposes changes to the criminal prohibition on gambling that would exempt an activity authorized under AS 05.18. Section 5. These provisions appear to contemplate a delegation of legislative authority to the commission to authorize new types of games of chance in Alaska law. Notably, AS 05.15 contemplates that the net proceeds from all games of chance will be dedicated to non-profit organizations and municipalities. It is not clear whether the authority conferred by these provisions would allow the commission to authorize games of chance in which the beneficiary was a for-profit entity. The lack of any reference in proposed AS 05.18.100(a) to AS 05.15 coupled with the implication in section 5, that new games will be authorized under AS 05.18 suggests that the commission may indeed have this power. If so, then the commission would be able to authorize any game of chance including casino games, lotteries, and slot machines.¹

¹ Each of these types of games of chance are considered "class III" games for purposes of the Indian Gaming Regulatory Act. 29 U.S.C. §§2701-2721. Authorization of these games in law will trigger the right of an Indian tribe with Indian lands as described by IGRA to seek a compact to conduct such games on their Indian lands.

Proposed AS 05.18.050 and .060 create and set forth the duties of the position of executive director for the commission.

Proposed AS 05.18.070 provides the commission with subpoena authority.

Proposed AS 05.18.300 creates a state gaming fund in the general fund for the deposit of revenues from gaming activities.

Proposed AS 05.18.310 requires that the commission's books and accounts be audited once a year by a CPA and the Legislative Budget and Audit Committee.

Proposed AS 05.18.320—.340 set forth a variety of prohibited acts that are each classified as a class C felony. Notably, in this list is a prohibition on the assignment of a contract. AS 05.18.330. The creation of a felony for conduct that is essentially a breach of contract may be unprecedented.

Proposed AS 05.18.350 requires all "gaming products" to indicate the odds of winning.

Proposed AS 05.18.900 sets forth the list of definitions pertinent to the Act.

Sections 5-9 of the initiative make various conforming changes

Section 10 is a severability clause, and Section 11 is a revisor instruction.

This initiative does not contain an effective date provision. The general rule is that the effective date of an initiated law is governed by the Alaska Constitution. Article XI, section 6, provides that "[a]n initiated law becomes effective ninety days after certification" of the election, provided a majority of the votes cast on the proposition favors its adoption. See also AS 15.45.220. Therefore, if the initiative were adopted, it would become effective as provided by the constitution. See 1993 Inf. Op. Att'y Gen., at 3 (Aug. 4; 663-93-0173).

B. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial." The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080.

1. The Form of the Application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

The application shall include (1) the proposed bill to be initiated, (2) a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, (3) the designation of an initiative committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the initiative, and (4) the signatures and addresses of not less than 100 qualified voters.

The application meets the first three requirements. With respect to the fourth requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

2. The Form of the Proposed Bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects -- dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation -- are listed in AS 15.45.010 and in article XI, section 7 of the Alaska Constitution.

Constitutional amendments are also a prohibited subject. *Starr v. Hagglund*, 374 P.2d 316, 317 n.2 (Alaska 1962). An initiative may not be used to attempt to accomplish an action contrary to law. *Cf. Whitson v. Anchorage*, 608 P.2d 759, 761 (Alaska 1980). Although *Whitson* involved a municipal initiative in conflict with a state law, we have previously taken the position that its holding is equally applicable to a proposed initiative that is plainly inconsistent with a provision of the Alaska Constitution. *See e.g.* 1990 Inf. Op. Att'y Gen. (Feb. 5; 663-90-0190); 1991 Inf. Op. Att'y Gen. (Nov. 7; 663-91-0527). Also, the subject of an initiative "must constitute such legislation as the legislative body to which it is directed has the power to enact." *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977). Our office has also opined in the past that the initiative may not be used as a vehicle for amending the Federal Constitution. *See* 1979 Inf. Op. Att'y Gen. (Feb. 13; 663-79-0474).

The form of the bill satisfies the requirements of AS 15.45.040. The bill is confined to a single subject, the establishment of a gaming commission in Alaska. The subject of the bill is expressed in the title of the bill, and the bill contains the required enacting clause language. The bill does not appear to address one of the subjects prohibited from initiative by the Alaska Constitution.

The form of the bill raises various issues that present post-election questions. For instance, the delegation of authority from the legislature to the Gaming Commission and to the executive director set out in the bill is exceedingly broad. Our office recently addressed the delegation doctrine in 2005 Inf. Op. Att'y Gen. (Feb. 15; 663-05-0141). In that opinion we explained that the case *State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1143 (Alaska 1987) sets out the method for evaluating the validity of a purported delegation of legislative power:

The essential inquiry is whether the specified guidance sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

The "field" is limited by attaching standards or conditions to the delegated powers under which the administrators are obliged to act in the performance of the powers. The court in *Municipality of Anchorage v. Anchorage Police Department Employee Ass'n*, 839 P.2d 1080, 1086 (Alaska 1992)(quoting 1 K. Davis, *Administrative Law*, sec. 3:15, at 206), summed up its holding on the delegation doctrine as follows:

Review of our decisions which have addressed delegation issues leads to the observation that whether one employs explicit or implicit standards, '[t]he basic purpose behind the delegation doctrine is sound:

Administrators should not have unguided and uncontrolled discretionary power to govern as they see fit.'

The Alaska Supreme Court approaches disputes involving delegated powers on a case-by-case basis. In the absence of a court decision specifically on this question, it is not possible to give absolute certainty over the validity of one set of standards over another.²

² The Alaska Supreme Court has upheld a delegation of broad authority to an agency with expertise to regulate a narrowly defined field regarding regulation of alcoholic beverages. *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960). It may be that the Court would view gaming regulation in a similar light.

As this initiative provides few standards for the activities of the Gaming Commission or the executive director issues may arise in the event the bill is enacted. The lack of specificity and standards set out in proposed AS 05.18, as contrasted with the fairly detailed standards for regulation of charitable gaming set out in existing AS 05.15, highlights this issue. We also note that in proposed AS 05.18.100, as set out in section four, on page 6 of CSHB 509(FIN) from the Twenty-third Alaska Legislature, that the commission was not allowed to authorize a gaming activity unless that activity was first authorized by the legislature. In contrast, proposed AS 05.18.100 of the initiative would empower the commission to "authorize future gaming activity."

Another post-election issue is that parts of the proposed bill are not drafted clearly. As explained above in the summary of the bill, it is unclear whether the bill would authorize for-profit gaming activities as opposed to purely charitable gaming activities. The proposed bill is also unclear in setting out which duties and responsibilities belong to the Gaming Commission, and which matters are within the director's control. The proposed bill also lacks a description of standards to guide the exercise of the Gaming Commission's or director's authority. For instance, the bill does not explain what sorts of "contracts" are authorized, what sort of permit or license would be issued to gaming operators, the fees the state would charge, the types of conditions and standards that would be imposed on gaming operations, or the types of actions that would lead to loss of a gaming permit.

As you know, the lieutenant governor is obligated to assure that a proposed initiative does not violate the restrictions of article XI, section 7 of the Alaska Constitution, however, the "usual rule is to construe voter initiative broadly so as to preserve them whenever possible." See, e.g., *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985). In general, other constitutional or legal infirmities must await passage of the initiative by the voters and review by the courts. See *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999). Therefore, our preelection review of this initiative is limited to determining whether the bill to be initiated includes a prohibited subject as set out in article XI, section 7, of the Alaska Constitution, and the various cases interpreting use of the initiative in Alaska, set out above. As we have explained above, we do not find that the bill to be initiated here includes a prohibited subject.

III. PROPOSED BALLOT AND PETITION SUMMARY

We have also prepared a ballot-ready petition summary and title for your consideration. We have worked with staff from the commercial section of our office to prepare this summary. It is our practice to provide you with a proposed title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180. We believe that it is

good practice for the petition and ballot to conform to the requirements of a title (six words) and ballot summary (100 words) under AS 15.45.180. We do this in order to reduce the chance of collateral attack due to a divergence between the ballot and petition summaries. We therefore propose the following ballot and petition title and summary for your review:

Initiative to Establish Alaska Gaming Commission

This initiative would set up a seven-member gaming commission in the state department of revenue, and would change some gaming laws. The commission would employ a director, make contracts, adopt regulations, investigate and enforce gaming laws. The commission could authorize future gaming activities, and join other states in multi-state gaming. The director would supervise gaming activities, enforce charitable gaming laws, and could revoke a gaming contract. The new law would bar certain acts as to gaming, and makes these acts a felony. Gaming allowed by the new law would not be unlawful gambling under the state criminal law.

Should this initiative become law?

This summary has a Flesch test score of 46.098, which is somewhat lower than the target readability score of 60. We have tried to use simple words to convey the complicated nature of the subject matter of this initiative. However, the readability score in this case is increased by the use of required multi-syllable words such as "commission," "gaming activities," "regulations," and "charitable." Given the text and subject matter of the bill to be initiated, we believe that the summary meets the readability standards of AS 15.60.005.

IV. CONCLUSION

For the reasons set out above, we find that the proposed bill and application are in the proper form, and that the application complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, we recommend that you certify this initiative application, and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

Please contact me if we can be of further assistance to you on this matter.

SJF:nfp

Hon. Loren Leman
Re: Initiative Petition 05AGAM

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cc: Laura Glaiser, Director
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